KASINATHAR BALENDRA THURAISINGAM

v.

MAJLIS PEGUAM MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[ORIGINATING SUMMONS NO: R1-17-11-00]
28 JULY 2001

LEGAL PROFESSION: *Practice of law - Practising certificate - Failure to produce accountant's report - Bar Council refusing to issue Sijil Annual - Whether exemption under r. 6 of Accountant Report Rules 1990 applicable - Application under s. 34 Legal Profession Act 1976 - Principles applicable*

LEGAL PROFESSION: *Practice of law - Partnerships between solicitors - Dishonesty of one partner - Innocent partner unable to produce accountant's report - Partnership subject of civil suits - Whether innocent partner jointly liable - Sections 11, 12, 13 & 14 Partnership Act 1961*

This was an application by the plaintiff under s. 34 of the Legal Profession Act 1976 ('LPA') to compel the Bar Council of Malaysia to issue him a 'Sijil Annual' to enable him to obtain his practising certificate.

The plaintiff was a dormant partner of a law firm known as M/s Clough Thuraisingam & Jeya Mahesan since 15 March 1997. His partner ('JM') was suspended from practice on 16 July 1998 pursuant to s. 88A of the LPA in respect of complaints made against him to the Bar Council for dishonesty and was later struck off the Roll. The partnership was subject to several civil suits including a claim based on misappropriation of funds amounting to RM2.8m. The plaintiff's application for a Sijil Annual was rejected as he was unable to produce an audited accountant's report and the Bar Council declined to grant him an exemption from producing the said report under r. 6 of the Accountant Report Rules 1990.

In this present application, the plaintiff claimed to be entitled to the Sijil Annual for the years 1999 and 2000 and prayed that he be exempted from producing the said accountant's report arguing that it was an agreed term of the merger of the accounts of his former firm with JM's firm that both the plaintiff and JM would conduct a proper audit of their respective firm's accounts. JM had failed to do so and had gone on to open banking accounts under the name of M/s Clough Thuraisingam & Jeya Mahesan without the plaintiff's knowledge or consent. Plaintiff's counsel submitted that he was an innocent party and was not in a position to produce the accounts and should

therefore be exempted from producing the said report. Further, JM's suspension and striking off the Roll had served the public interest that a dishonest lawyer should not be allowed to practice. Counsel for the Bar Council argued that the shortfall involved a huge amount in excess of RM2.8m and, more importantly, the suits filed were against both partners and every partner had a joint liability under *inter alia* part III of the Partnership Act 1961, especially, ss. 11, 12 13 and 14 thereof.

Held:

[1] In *Yip Shou Shan v. Majlis Peguam* the Supreme Court agreed with the views expressed by the Bar Council that "an advocate and solicitor is in a position of a trustee *vis-a-vis* his client's money and must therefore produce a clean accountant's report in respect of all moneys handled by any office of his partnership during any period for which he is a partner." Hence there was force in the argument that there was an agreement that JM and the plaintiff were to maintain separate accounts in the partnership. So long as JM and the plaintiff were partners, any defalcation in his supposed "own accounts" would be sufficient to put liability on the plaintiff in so far as the accounts of the partnership were concerned, of course, bearing in mind the law on partnership.

[2] The High Court in its own original jurisdiction could not reach a conclusion that the plaintiff should be exempted from producing an accountant's report for the relevant period and override the Bar Council's discretion in refusing to grant the plaintiff exemption from delivering to the registrar an accountant's report and to grant the Sijil Annual for the years 1999 and 2000. The plaintiff would need to produce the accountant's report for the relevant period and it would be up to the Bar Council to consider it.

[Application dismissed; each party to bear its own costs.]

Case(s) referred to:
DP Vijandran v. Majlis Peguam [1996] 1 CLJ 23 ***(refd)***
Joseph Singaram Pillay v. Malaysian Bar [1993] 4 CLJ 151 ***(refd)***
Yip Shou Shan v. Majlis Peguam [1994] 3 CLJ 150 ***(foll)***

Legislation referred to:
Accountant's Report Rules 1990, r. 6(2)
Legal Profession Act 1976, ss. 29, 32, 34, 88A
Partnership Act 1961, ss. 11, 12, 13, 14

For the plaintiff - Ranjit Singh; M/s Ranjit Ooi & Robert Low
For the defendant - Robert Lazar; M/s Shearn Delamore & Co

Reported by Cindy Chan

JUDGMENT

KC Vohrah J:

This is a sad story of a man, the plaintiff, who practiced law for about 27 years without blemish being unable to practise because he was not able to obtain an annual certificate (Sijil Annual) under s. 32 of the Legal Profession Act 1976 (the Act) from the Bar Council since 1999. He would need the Sijil Annual to submit to the registrar of the High Court for an annual practicing certificate to be issued under s. 29 of the Act.

He had trusted a fellow practitioner and on 15 March 1997 went into a partnership with him to practise law. But he was mostly a dormant partner during the period of the partnership having being concerned with his own busy legal practice on an international platform in Cambodia. There is no allegation of dishonesty against him personally during that period. His erstwhile partner, Encik Jeyapalan Mahesan, was suspended on 16 July 1998 by the Chief Judge (Malaya) from practice pursuant to s. 88A of the Act in respect of a complaint against him made by the Bar Council for dishonesty.

The partnership is now saddled with several civil suits one of which involves a claim based on misappropriation of funds amounting to RM2.8 million by the partnership.

The accounts of that partnership have not been audited. The plaintiff is not able to produce an accountant's report for the period of the partnership. His application for a Sijil Annual was turned down on that account.

The Bar Council did not act under r. 6 of the Accountant's Report Rules 1990 (the Rules) to give him a certificate exempting him from delivering the accountant's report to the Registrar of the High Court (under s. 29 of the Act).

The plaintiff has now come to the High Court for help under s. 34 of the Act. The provision allows an advocate and solicitor who is dissatisfied "with the refusal, neglect or delay in the issue to him of a Sijil annual" to apply to a judge "directing the Bar Council to issue him with a Sijil Annual".

He has filed for orders that he is entitled to a Sijil Annual for the years 1999 and 2000 and that he be exempted from producing the audited account in respect of banking accounts opened under the name of Messrs Clough Thuraisingam & Jeya Mahesan and that he be further issued with a Sijil Annual for the year 2000 by the Bar Council.

It has been decided by the Court of Appeal in *DP Vijandran v. Majlis Peguam* [1996] 1 CLJ 23 in respect of the court's function under s. 34 that a High Court, when faced with an application under s. 34 of the Act, must treat the matter as originating before it.

There is a Supreme Court decision *Yip Shou Shan v. Majlis Peguam* [1994] 3 CLJ 150 which is pertinent to this case. It deals with s. 32 of the Act relating to the refusal by the Bar Council to issue a Sijil Annual because the advocate and solicitor applying for the Sijil Annual could not produce a clean accountant's report with the application. In our case, of course, the plaintiff cannot produce an accountant's report at all and one of the issues is whether he should be exempted under r. 6 of the Rules from delivering the report to the registrar of the High Court.

The Supreme Court held the view that the Bar Council had acted fairly in the case by refusing to issue the Sijil Annual to the appellant for the year 1994. The court observed that the appellant had to submit an accountant's report showing that he had kept his accounts in accordance with the Rules and that the Bar Council was also correct in refusing to give an exemption from delivery of an accountant's report under r. 6 of the Rules simply because the appellant could not establish that his case came within any of the matters enumerated under para. (2) of r. 6. The court also agreed with the Bar Council that the case was not a proper case to grant an exemption under r. 6 because the deficiency in the client's accounts of RM705,091.89 was quite substantial, notwithstanding that no clients of the appellant's former firm had made any complaint.

The Supreme Court at p. 154 also agreed with the views expressed by the Bar Council that an advocate and solicitor "is in a position of a trustee *vis-a-vis* his client's money and must therefore produce a clean accountant's report in respect of all moneys handled by any office of his partnership during any period for which he is a partner."

More importantly the Supreme Court observed:

> The Bar Council is not concerned with the internal financial and other arrangements between partners *inter se* and that it is up to every partner to ensure that the partnership accounts are in order at all times, in particular before leaving the partnership or before the partnership is wound up ...

Counsel for the plaintiff has relied on the passage in the case at p. 155 where the Supreme Court observed:

> ... we are of the view that s. 32 of the Act imposes a duty on the Bar Council to process and scrutinise every application for a Sijil Annual. It is the Bar Council's paramount duty to ensure that only an honest, trustworthy, fit and proper advocate and solicitor should be allowed to practice. Any act of dishonesty on the part of an advocate and solicitor would bring the Bar Council and the legal profession into disrepute. The issuance of a Sijil Annual by the Bar Council is its recommendation to the registrar that such advocate and

> solicitor is a fit person to be issued a practicing certificate under s. 29 of the Act. If the Bar Council fmds that an advocate and solicitor has failed to keep proper account of all moneys received by his firm and therefore be cannot deliver a clean accountant's report, the Bar Council is entitled to refuse to issue a sijil annual and consequently will not recommend to the registrar for the issuance of a practicing certificate to the advocate and solicitor concerned. It is, therefore, clearly misconceived to interpret the role of the Bar Council as merely a rubber-stamping process, it having no discretion to refuse to issue a sijil annual in circumstances where clearly it should not be issued in the public interest ...

Counsel for the plaintiff says this passage has placed particular emphasis on the duty of the Bar Council to ensure that dishonest lawyers are not allowed to practise law for this would not be in the public interest. It was argued on the facts of the case that public interest in the case has been taken into account in that the dishonest partner has been suspended and subsequently struck off the Roll and that public interest will not be served if the defendant, being an innocent partner, is not issued with a Sijil Annual to allow him to practise law; that to the contrary it is in the public interest to ensure that an honest lawyer is allowed to practise.

Before I deal with this particular argument let us look at the facts which are largely undisputed. The facts are substantially as presented in the submission of counsel for the plaintiff gleaned from the affidavits.

The plaintiff is a senior advocate and solicitor having been admitted on 10 July 1970. He practised in the firm of Messrs Clough Thuraisingam (CT) until the amalgamation of CT with Messrs Jeya Mahesan & Co (JMC). JMC was a sole proprietorship of one Encik Jeya Mahesan (JM). On 15 March 1997, CT and (JMC) were merged under the name and style of Messrs Clough Thuraisingam & Jeya Mahesan (CTJM). Its two partners were the plaintiff and (JM).

It was an agreed term of the merger that prior to CT and JMC actually merging their accounts and prior to any bank account being opened under the name of CTJM both the plaintiff and JM would do a proper audit of their own firm's accounts and that until such audit, the plaintiff and JM would continue using and maintaining their own respective accounts for the conduct and business of CTJM. The actual merger exercise of the accounts was never completed as JM did not produce the audited accounts of JMC.

The plaintiff says he had no knowledge of any banking accounts purportedly opened under the name of CTJM.

On 16 July 1998 the High Court made an order (during the existence of CTJM) suspending JM from practicing as an advocate and solicitor pursuant to s. 88A of the Act. The s. 88A order was made as a result of complaints made to the Bar Council concerning JM's dishonesty in his capacity as an advocate and solicitor. Complaints were made amongst others by Wee Poh Holdings (Wee Poh) and Export Cars Corporation. The Bar Council in its application under s. 88A cited public importance as a factor against JM.

The plaintiff says he has since discovered various civil suits against CTJM by reason of JM's dishonest conduct. One of them has been filed in Kuala Lumpur High Court, Civil Suit No. D6-22-2334-98, by Wee Poh where the cause of action is over allegations of misappropriation of funds amounting to RM2.8 million by CTJM as stake holders. Various cause papers in the Wee Poh case show the following salient features:

(1) a cheque issued by Messrs Yeow & Salleh for RM2.8 million was purportedly credited into an account named Messrs Clough Thuraisingam & Jeya Mahesan;

(2) the said RM2.8 million was credited into a fixed deposit account with Perwira Affin Bank Berhad under the name of Clough Thuraisingam & Jeya Mahesan (formerly known as FKA Jeya Mahesan & Co); and

(3) an Oriental Bank Berhad cheque No. 548444 bearing the account name of "Clough Thuraisingam & Jeya Mahesan, Firm's account, Disbursement's A/C" for the amount of RM2.8 million was purportedly issued to Messrs Yeow & Salleh.

The plaintiff says he had no knowledge of any of these payments or the bank accounts and that he never authorised the opening of any of such accounts in the name of CTJM and he never authorised the name change of JMC's account at Perwira Affin Bank Berhad to CTJM.

Other suits have also been filed against CTJM. Two of these suits involved, *inter alia,* allegations of breach of undertaking by CTJM. The third suit is a suit by Standard Chartered Bank to recover overdrawn amounts relating to a current account purportedly opened by CTJM. The plaintiff says he was not involved in any of the transactions and neither did he have any knowledge nor did he consent to the opening of a current account in Standard Chartered Bank.

The submission of counsel for the plaintiff in the context of the facts adumbrated, to reiterate, is that the plaintiff was an innocent party throughout and it was his erstwhile partner who was dishonest and that the man was suspended and has been struck off the Roll, thus serving the public interest

that a dishonest lawyer should not be allowed to practise. The plaintiff, however, was never dishonest nor is there a suggestion that he was involved in the dishonesty. Further, the plaintiff is in no position to produce the accounts of the partnership and he should be exempted from producing the account. Counsel for the plaintiff has also relied on the case of *Joseph Singaram Pillay v. Malaysian Bar* [1993] 4 CLJ 151.

However, as counsel for the Bar Council has pointed out, and it is clear in the instant case, that although the accounts have not been produced the shortfall is not a small but a very huge amount in excess of RM2.8 million (in *Yip* the deficiency was RM705,091.89 after an accountant's report was rendered). And, clearly too, the amount of RM2.8 million is from just one case filed against CTJM and there are, in fact, other cases filed against CTJM. More importantly the suits filed against CTJM are against both the partners, the plaintiff and Encik Jeya Mahesan and every partner has joint liability under, *inter alia*, Part III of the Partnership Act 1961 and especially ss. 11, 12, 13 and 14 thereof

In the instant case the plaintiff does appear to be innocent of any dishonest conduct in regard to the accounts of the partnership while in *Yip,* Yip could not advance any reason for the shortfall. Although the Supreme Court had used language relating to dishonesty bringing disrepute to the legal profession there was no finding of dishonesty made against Yip. In fact the fault or lack of blame on the part of the individual advocate and solicitor was not a factor that the court took into consideration in *Yip*. Indeed the Supreme Court in *Yip* stated:

> We agree with the views expressed by the Bar Council that an advocate and solicitor is in a position of a trustee, *vis-a-vis* his client's money and must therefore produce a clean accountant's report **in respect of all moneys handled by any office of his partnership during any period for which he is a partner.** (emphasis added).

I agree with the view of counsel for the Bar Council the words on which emphasis has been added show that there is no force in the argument that there was an agreement that JM and the plaintiff were to maintain separate accounts in the partnership. Thus for so long as JM and the plaintiff were partners, any defalcation in his supposed "own accounts" would be sufficient to put liability on the plaintiff in so far as the accounts of the partnership are concerned, of course, bearing in mind the law on partnership.

In *Joseph Singaram Pillay*, the plaintiff could not produce to the "Malaysian Bar" the "accountant's certificate" of the Kuala Lumpur office Zaibuddin Ambak & Associates. In 1990 the plaintiff had "decided to associate with another senior lawyer Zaibuddin Ambak in Kuala Lumpur." The High Court

observed "that the true nature and extent of the association are in dispute except that both the lawyers used the firm name of Zaibuddin Ambak". Zaibuddin Ambak was suspended by the Chief Judge (Malaya).

The plaintiff produced his "own" office accounts in Johor when applying for the "Sijil Annual" but could not produce the "accountant's certificate" of the Kuala Lumpur office. I am not entirely sure if the decision went on the footing that there was a partnership subsisting between the plaintiff and Zaibuddin Ambak during the material period or that there was an "association" between the plaintiff and Zaibuddin Ambak as the court talked about "the alleged partnership or association" (see p. 153 G). There is a finding, "There is no suggestion of his involvement in the affairs of Zaibuddin Ambak ..." The court granted the plaintiff's prayer for the issue of the Sijil Annual but it is not clear if the court had made a finding that both the plaintiff and Zaibuddin were partners or in "association" – whatever the latter term means. If it is suggested that by this association there is no joint liability then the 1993 case cannot be relied upon in our instant case as there is no dispute that there was a partnership. If, however, it is to show that even in a partnership, a partner if innocent of any wrong doing can be issued with a Sijil Annual then of course we have to hearken to the later case, the *Yip* case, a Supreme Court case, decided in 1994, where the court stated at p. 154, "The Bar Council is not concerned with the internal financial and other arrangements between partners *inter se*. It is up to every partner to ensure that the partnership account are in order at all times, in particular before leaving the partnership or before the partnership is wound up."

I do not see how the High Court in its own original jurisdiction can reach a conclusion that the plaintiff should be exempted from producing an Accountant's Report for the relevant period and override the Bar Council's discretion in refusing to grant the plaintiff exemption from delivering to the Registrar an Accountant's Report and its refusal to grant the Sijil Annual for the years 1999 and 2000.

The plaintiff would need to produce the Accountant's Report for the relevant period and it will be up to the Bar Council to consider it.

The application is dismissed. Each party to bear its own costs.